



Minister for Aboriginal and Torres Strait Islander Affairs  
Minister for Children, Youth and Families  
Minister for Health  
Member for Kurrajong

Mrs Giulia Jones MLA  
Chair  
Standing Committee on Justice and Community Safety - Legislative Scrutiny Role  
ACT Legislative Assembly  
London Circuit  
CANBERRA ACT 2601

Dear Mrs Jones

I write in relation to Scrutiny Report Number 44 of the Standing Committee on Justice and Community Safety (the Committee) concerning the Public Health Amendment Bill 2020 (the Bill) that was introduced in the Assembly on 4 June 2020.

The Committee requested information as to whether the approach taken in Victoria, or any other form of limited compensation scheme, has been considered.

The ACT Government has examined the range of approaches to compensation under the public health and emergency statutes in other Australian jurisdictions. This consideration has extended to s204 of the *Public Health and Wellbeing Act 2008* (VIC) which provides for compensation in respect of public health directions in circumstances where the use of the power was based on insufficient grounds. The Victorian provisions are a reasonable consideration in the context of an ordinary public health situation that does not require protective whole of community action. However, the Government has concluded that such provisions would not be suitable as a response to COVID-19 in the ACT. There are a number of reasons for this.

Taking this approach would potentially draw heavily on the administrative resources of government and involve substantial costs for applicants, with a low probability that any applications would actually be successful. This is because the Chief Health Officer's directions in response to the global pandemic have been guided by the Australian Health Protection Principal Committee (AHPPC) and have been consistent with those of other jurisdictions. It is therefore very unlikely that a decision-maker would find that there were insufficient grounds for directions made or actions taken under Part 7 of the Act.

Treasury has estimated that these administrative costs could run into the millions, depending on the number of applications received, because each application would need to be considered on its own merits and individual decisions made. Many applicants would also incur legal and administrative costs in putting together applications that adequately set out their losses, how those losses relate to a thing done under Part 7 and why there were insufficient grounds for the thing.

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## ACT Legislative Assembly

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At the same time, while the probability of any application being successful is considered low, the potential fiscal impact of a successful application could be significant. This would particularly be the case if a successful application or appeal to judicial review opened the door to a large class of applicants receiving compensation in relation to the relevant direction or action. This fiscal risk, while not quantifiable, could dramatically affect the Territory's financial position and the ACT Government's ability to respond to the whole-of-economy and whole-of-community impact of COVID-19. This includes the many costs and consequences of the pandemic that are not directly related to the Chief Health Officer's actions or directions.

A number of other jurisdictions have also made amendments to provide that the compensation provision in their respective public health legislation does not apply for loss or damage in relation to the COVID-19 emergency. These jurisdictions have recognised that their compensation provisions with respect to the exercise of public health powers are not designed to respond to pandemics which require the imposition of community wide restrictions.

Across Australia, the public health measures to limit the impact of COVID-19 on the Australian community are anchored in advice from the AHPPC to the National Cabinet. Importantly, the proactive approach to implementing and sustaining the AHPPC advice has been vital to controlling the spread of COVID-19 in Australia. This, in turn, has prevented Australia from experiencing the devastating economic consequences of widespread COVID-19 infections and deaths that have been seen in many overseas jurisdictions.

Since the start of the COVID-19 public health emergency, the ACT Government has provided significant support to the community to deal with the impacts of COVID-19 through a series of stimulus packages. These have included targeted support for those businesses and sectors that have been hardest hit as a result of the COVID-19 emergency. Should an individual or business consider that their exceptional circumstances warrant specific financial support, the ACT Government retains the capacity to consider such matters through the discretionary 'act of grace' framework under the *Financial Management Act 1996*.

In considering the options available to Government and the matters detailed above, I remain of the view that this Bill is a proportionate response.

I thank the Committee for its thoughtful scrutiny of this Bill and this opportunity to engage on the issues outlined in the Report.

Yours sincerely

Rachel Stephen-Smith MLA